REMARKS

At the time the present Office Action was mailed on August 16, 2010, claims 1-4 and 19-32 were pending in this application. By this submission, Applicant has amended claim 25 to correct two typographical errors. No new matter has been added. Claims 1-4 and 19-32 are currently pending in this application.

In the present Office Action, the pending claims were rejected as follows:

A. Claims 1-4 and 22-32 were rejected under 35 U.S.C. § 103(a) as being obvious and unpatentable over U.S. Patent No. 6179147 to Mogard et al. ("Mogard") in view of U.S. Patent No. 3312368 to Reynolds et al. ("Reynolds").

B. Claims 19-21 were rejected under 35 U.S.C. § 103(a) as being obvious and unpatentable over Mogard and Reynolds and further in view of U.S. Patent No. 5176300 to Kishikawa et al. ("Kishikawa").

A. Response to the Section 103(a) Rejection of Claims 1-4 and 22-32

Claims 1-4 and 22-32 were rejected under 35 U.S.C. § 103(a) as being obvious and unpatentable over Mogard in view of Reynolds. Claims for an invention are not *prima facie* obvious if the prior art does not suggest all elements of the claims and it would not have been obvious to one of ordinary skill in the art to combine the prior art in the manner suggested by the application's claims (*KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007)). Applicant submits that the applied references cannot support a *prima facie* case of obviousness.

1. Claims 1-4 and 22-32 Are Directed To A Fitment For A Container

Claims 1-4 and 22-32 are directed to a fitment for a container and to a fitment and container assembly. Independent claim 1 is directed to a fitment for a container

having a first wall associated with the top of the container. The fitment has a circumferential flange member adapted to engage the first wall of the container in circumscribing relationship to an opening through the first wall of the container. The fitment has a second wall defining a conduit with an exit end that has a substantially ellipsoidal planar cross-sectional geometry with a major portion and a minor portion. The minor portion of the conduit is disposed vertically above the major portion of the conduit when the fitment is affixed to the container's first wall and the container is oriented in a direction for discharge of the contents of the container through the opening and substantially simultaneous ingress of ambient air into the container through the minor portion of the fitment.

The fitment has a tear away membrane with a tamper evident membrane portion disposed across the conduit at a location fully within the conduit intermediate the entrance and exit of the conduit and spaced apart from the circumferential flange. The first wall associated with the top end of the container will be in a plane between the membrane portion and the circumferential flange. The tamper evident membrane includes a pull ring affixed to the tamper evident membrane portion adjacent to the conduit's minor portion and configured to provide for localization of an initial tear away force applied through the pull ring to the tamper evident membrane portion adjacent to the conduit's minor portion to reduce the force needed for initiation of tearing away of the tamper evident membrane portion from the inner wall of the conduit at the minor portion. A cap member is pivotally connected to the wall defining the conduit. The cap has an annular receiving area between first and second annular projections, and the annular receiving area is configured to receive in a sealing engagement an outboard rim of the second wall to thereby releasably close and seal the conduit against the passage of the contents of the container.

Independent claim 25 is directed to a fitment and container assembly. The container has an opening with an ellipsoidal shape. A circumferential flange member is adapted to engage the container's top wall in circumscribing relationship to the opening

for mounting of the fitment to the container. A second wall extends from the flange member and defines a conduit having an inner wall and entrance and exit ends. The conduit has a substantially ellipsoidal planar cross-sectional geometry substantially corresponding to the opening's ellipsoidal shape and having major and a minor portions. The minor portion is disposed vertically above the major portion when the fitment is affixed to the container's first wall and the container is oriented for discharge of the contents through the opening and substantially simultaneous ingress of ambient air into the container through the minor portion of the fitment. A tear away membrane with a tamper evident membrane portion is disposed across the conduit at a location fully within the conduit intermediate the entrance and exit ends of the conduit and spaced apart from the circumferential flange. The first wall associated with the top end of the container will be in a plane between the membrane portion and the circumferential flange.

The tamper evident membrane includes a pull ring affixed to the tamper evident membrane portion adjacent to the minor portion of the conduit and configured to provide for localization of an initial tear away force applied through the pull ring to the tamper evident membrane portion adjacent to the minor portion of the conduit to reduce the force needed for initiation of tearing away of the tamper evident membrane portion from the inner wall of the conduit. A cap is integrally connected to the conduit and has an ellipsoidal shape substantially corresponding to the ellipsoidal planar cross-sectional geometry of the conduit and configured to pivot relative to the conduit between open and closed positions.

2. The Applied References – Mogard and Reynolds

Mogard is directed to a closure for a package, such as a gable-top container. The closure has a flange mounted to the top surface of the container's gable panel (*See,* Mogard, Fig. 1 and col. 3:41-48. "An upstanding spout 20 having a generally cylindrical shape extends from a side 22 of the flange 18 that is mounted to the carton panel 16." Mogard, col. 3:44-46 (emphasis added). A barrier membrane is formed at

about the base of the spout and flush or coplanar with the flange. Mogard, col. 3:48-54. The reference emphasizes the importance of providing the barrier membrane at the base of the spout, coplanar with the flange to avoid formation of pockets within the spout that can be difficult to pasteurize. Mogard, col. 5:40-46. The reference also discloses a snap-type cap "hingedly mounted to the flange 18 by a dual-action hinge 30. A first hinge member 32 pivots the cap 28 relative to the spout 20, and a second hinge member 34 pivots the cap 28 relative to the flange 18 to fully position the cap 28 out of the way of the spout 20 and the flow stream of the contents from the package 10." Mogard, col 3:56-62. *See also*, col. 6:34-36, and Figs 2-7.

Reynolds discloses an easy-open can end "having a pre-cut aperture therein and a single overlying tab which will not leak under high internal gaseous pressures commonly encountered with carbonated beverages." Reynolds, col. 1:61-64. The overlying tab is bonded to the can end, and the pouring opening is free from any surface irregularity or similar roughness which might inconvenience or irritate the consumer. Reynolds, col. 2:1-3 and 16-18.

3. The Applied References Fail To Teach Or Suggest All Elements Of The Claims

The applied references cannot support the obviousness rejection at least because the applied references, taken alone or in combination, fail to teach or suggest each and every element of the claims. For Example, Mogard fails to teach or suggest a fitment with a second wall defining a conduit with an exit end having a substantially ellipsoidal planar cross-sectional geometry with major and minor portions, wherein the minor portion is disposed relative to the major portion as claimed to allow discharge of the container's contents and substantially simultaneous ingress of ambient air into the container. Instead, Mogard discloses that an "upstanding spout 20 having a generally cylindrical shape extends from a side 22 of the flange 18 that is mounted to the carton panel 16." Mogard provides minimal discussion regarding the shape of the spout, at least in part because the patent's disclosure is focused on the interrelationship between

the membrane and inner wall at the bottom of the spout. The reference provides no teaching or suggestion of modifications to the shape of an exit end of the spout to provide an ellipsoid shape with the major and minor portions as claimed. The only teaching of such a configuration is provided by Applicant's disclosure.

Reynolds fails to correct the deficiency of Mogard. Reynolds discloses the easy-open can with a pre-cut aperture covered by a single overlying tab. Reynolds discloses the aperture in the top of the can as being teardrop-shaped (col 3:40, and Figs 1 and 2) or elliptical (col. 5:32 and Figs 5 and 6). Reynolds is completely silent regarding the use of a spout. Further, the reference is silent regarding any particular shape of an exit end of a spout. This lack of disclosure is understandable because the reference focuses on the inventive feature of the peel tab bonded or otherwise adhered to the top of the can to cover the aperture in the top of the can. In the Office Action, the Examiner states that it would have been obvious "to modify the device of Mogard by shaping the dispensing opening to having an ellipsoidal cross section to facilitate pouring and permitting air to vent into the container as taught by Reynolds." First, Reynolds discloses the embodiment having the elliptical hole in the top of the can, and teaches the use of a separate venting aperture spaced apart from the elliptical cross-section. Reynolds, col. 5:31-40. Reynolds does not teach a dispensing opening of a spout with an elliptical cross-section, nor does the reference discuss the elliptical aperture (without the separate venting aperture) "to facilitate pouring and permit air to vent into the container" as asserted by the Examiner.

Further, any modification of Mogard in view of Reynolds would result in a teardrop-shaped or elliptical-shaped aperture in the top wall of the container. Such a modification would still not result in the fitment and container as claimed. Applicant notes that, while Mogard infers that the carton panel 16 of the container has an aperture or opening, the reference actually provides no mention of an actual opening in the container. Mogard also provides no discussion or analysis of the shape or venting needs of such an aperture in the top panel. The reference is further silent regarding any

correlation needed between a hole in the panel and the cross-sectional shape of the spout. Accordingly, even if Mogard is modified in view of the teachings of Reynolds to provide a teardrop or elliptical-shape hole in the container, the result would still not result in the claimed invention. The only teaching of the claimed configuration is provided by Applicant's disclosure. The Examiner's proposed modification of the teaching of the references to provide the claimed fitment and container would only have been apparent to one skilled in the art after fully understanding Applicant's invention and applying impermissible hindsight analysis.

Applicant further submits that the pending claims also recite a fitment with a tear away membrane with a tamper evident membrane portion disposed across the conduit at a location fully within the conduit intermediate the entrance and exit of the conduit and spaced apart from the circumferential flange. Mogard fails to teach or suggest a fitment with such a configuration. In fact, Mogard teaches that the membrane is attached to the bottom of the spout flush with the spout's flange that attaches to the top wall of the container. The reference states: "As discussed above, the present membrane also permits a substantially flush formation of the membrane 14 relative to the flange 19, thus reducing or eliminating the formation of pockets within the spout 20. This is desirable in that it enhances the ability to pasteurize or otherwise sterilize the product in the package 10, and this reduces the opportunity for bacterial growth or other contamination." Mogard, 5:40-46. Accordingly, Mogard fails to teach or suggest the fitment with the tamper evident membrane portion as claimed. Reynolds fails to correct the deficiencies of Mogard.

Applicant further submits that Mogard expressly teaches away from Applicant's fitment as claimed. Mogard teaches that providing a membrane intermediate the top and bottom ends of the spout creates a region or pocket between the membrane and the bottom of the spout that is an opportunity for bacterial growth, and that such a pocket below the membrane can be difficult to sterilize. Mogard, col 1:47-56. Accordingly, Mogard teaches that the membrane is provided at the bottom of the spout

and teaches away from the fitment as claimed with the tamper evident membrane portion disposed across the conduit at a location fully within the conduit intermediate the entrance and exit of the conduit and spaced apart from the circumferential flange. Accordingly, the reference fails to teach or suggest the fitment as claimed and fails to teach or suggest the modifications required to bring the reference's teaching into conformity with the claim. The only teaching of such a configuration is provided by Applicant's disclosure.

The references fail to disclose or teach yet another feature of the claims. Claim 1 recites the fitment for the container, which has the first wall associated with the top of the container. The fitment is configured wherein the top end of the container will be in a plane between the membrane portion and the circumferential flange. Mogard does not teach or suggest such a configuration. Mogard shows in Figure 1 the closure attached to the gable panel of the package, and Mogard also states that "the closure 12 is mounted to a gable panel 16 of the gable top carton or package. The closure 12 includes a flange 18 by which it is mounted to the upstanding spout 20 having a generally cylindrical shape extends from a side 22 of the flange 18 that is mounted to the carton panel 16. An opposite side 24 of the flange 18 is oriented inwardly of the package 10." Mogard, 3:41-48. Nowhere does Mogard disclose or suggest that the closure has a circumferential flange and a membrane portion as claimed wherein the top end of a container will be in a plane between the membrane portion and the circumferential flange. Reynolds does not correct the deficiency of Mogard. Accordingly, the applied references fail to disclose each and every feature of the claims. The applied references also provide no teaching or suggestion of the modifications required to bring the references into conformity with the claim. Any modification of the applied references to result in the claimed fitment would only be apparent to one skilled in the art after fully understanding the present invention and applying impermissible hindsight analysis.

Claim 1 also recites a cap pivotally connected to the wall defining the conduit. The cap has an annular receiving area between first and second annular projections, and the annular receiving area is configured to receive therein in a sealing engagement an outboard rim of the second wall to thereby releasably close and seal the conduit against the passage of the contents of the container. Claim 25 also recites a cap integrally connected to the conduit and having an ellipsoidal shape substantially corresponding to the ellipsoidal planar cross-sectional geometry of the conduit and configured to pivot relative to the conduit between open and closed positions. Mogard fails to disclose or teach the cap pivotally connected to the wall defining the conduit. To the contrary, Mogard discloses a cap hingedly mounted to the flange 18 by a dual-action hinge. Mogard, col 3:55-62. Mogard also fails to disclose or teach a cap as claimed having an annular receiving area between first and second annular projections, wherein the annular receiving area is configured to receive therein in a sealing engagement an outboard rim of the second wall, as claimed. Mogard is simply silent regarding the fitment with the cap as claimed. Reynolds does not disclose a cap as claimed, and thus fails to correct the deficiency of Mogard. The only teaching of such a fitment is provided by Applicant's disclosure, and any modification of Mogard to provide the claimed fitment would only be apparent to one of ordinary skill in the art after fully understanding Applicant's invention and applying impermissible hindsight analysis.

For at least the reasons discussed above, Applicant respectfully submits that the applied references fail to disclose each and every feature of the claimed invention and fail to suggest the modifications required to bring the cited references into conformity with the claims. Therefore, the Examiner has failed to provide a *prima facie* showing of obviousness under Section 103.

4. Dependent Claims 2-4, 22-24, and 26-32 Are Also Patentable Over The Applied References

Claims 2-4 and 22-24 depend from claim 1, and claims 26-32 depend from claims 25. Applicant respectfully submits, for at least all of the reasons discussed

above and the features of the dependent claims, that claims 2-4, 22-24, and 26-32 are patentable over Mogard and Reynolds taken alone or in combination.

B. Response to the Section 103(a) Rejection of Claims 19-21

Claims 19-21 were rejected under 35 U.S.C. § 103(a) as being obvious and unpatentable over Mogard and Reynolds and further in view of Kishikawa. Claims 19-22 ultimately depend from claim 1. Kishikawa is cited as disclosing a fitment attached to an inner wall of a container. Even if Kishikawa provides such a teaching, to which Applicant does not acquiesce, Kishikawa does not correct all of the deficiencies of Mogard and Reynolds. Therefore, Applicant respectfully submits, at least for the reasons discussed above and the features in the claims, that claims 19-22 are also patentable over the applied references and are in condition for allowance.

C. Conclusion

In light of the foregoing remarks, all of the pending claims are in condition for immediate allowance. Therefore, Applicant respectfully requests reconsideration of the application and allowance of all pending claims. If the Examiner wishes to discuss any matter related to this application, the Examiner is encouraged to contact Robert G. Woolston by telephone at (206) 359-3259 to expediently resolve any such matter.

No fees are believed due with this communication, however, the Commissioner is hereby authorized and requested to charge any deficiency in fees herein to Deposit Account No. 50-0665.

Dated: 11-15-2010

Respectfully submitted,

By _____
Robert G. Woolston
Registration No.: 37,263
PERKINS COIE LLP
P.O. Box 1247
Seattle, Washington 98111-1247
(206) 359-8000
(206) 359-9000 (Fax)
Attorney for Applicant